Returning to the case of *Favorite* v. *Superior Court*, the applicability of the prejudice statute to such a case was not even hinted at in the court's opinion. Applying the rule contended for to its facts, it would certainly seem that the inference of bias resulting from the marital relationship with a stockholder in the defendant corporation is not too remote or speculative, and that, therefore, the judge should have been found incompetent on the ground of bias, had the petitioners relied thereon in their application for a change of venue.[34]

THE EMPLOYMENT OF DECOYS IN THE DETECTION OF CRIMINALS.—It is elementary that for most crimes two elements are necessary—the criminal act and the criminal intent. In the case of felonies, he who does the act is the principal, and the one who induces him is the accessory before the fact; while in the case of misdemeanors both the actor and the instigator are principals. Where the crime is not carried out or where it is only partially executed, the inducing party is nevertheless guilty of solicitation, and where the acts come close enough to the commission of the crime, he is guilty of an attempt.

Where a man incites and participates in a crime for the sole purpose of having the perpetrator caught and punished, some courts regard the former as an accomplice,[1] but most jurisdictions hold him not guilty, since he has not the requisite intent,[2] and all courts are agreed as to his innocence where the principal had originated the intent himself and is merely encouraged by the decoy.[3] Even where homicide or physical harm results from the instigation of the decoy, and his subsequent failure to frustrate the plot, it seems that he cannot be held for the crime incited, but is liable in damages only.[4] He may not, however, habitually violate the law in order to detect the criminal.[5]

How do the solicitations of the decoy affect the person induced to commit the crime? It seems that the latter should be punished at all events where the necessary elements—the criminal act and the criminal

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under its prejudice statute. See Kentucky Jour. Pub. Co. *v.* Gaines (1908) 139 Ky. 747, 751, 110 S. W. 270. Ingles *v.* McMillan, *supra,* footnote 30, also quotes approvingly People *v.* Findley (1901) 132 Cal. 301, 304, 64 Pac. 472, which lays down by way of *dictum* the rule contended for.

[34]The rule of construction that the expression of one thing excludes all others was applied by the court to Subd. 2 of the Code Section in question, *supra,* footnote 14. A judge, therefore, is not disqualified under this statute by reason of his relationship to any person connected with a corporation except an officer thereof. It seems that the only possible way of disqualifying a judge in California on such facts is by treating the problem from the prejudice standpoint.

[1]Dever *v.* State (1895) 37 Tex. Crim. 396, 30 S. W. 1071; Davis *v.* State (Tex. 1913) 158 S. W. 288.

[2]Backenstoe *v.* State (1900) 19 Ohio Cir. Ct. 568; Price *v.* People (1884) 109 Ill. 109; People *v.* Noelke (1883) 94 N. Y. 137; see also People *v.* Emmons (1908) 7 Cal. App. 685, 692, 95 Pac. 1032.

[3]See State *v.* Gibbs (1909) 109 Minn. 247, 123 N. W. 810; Campbell *v.* Commonwealth (1877) 84 Pa. 187, 197.

[4]1 Wharton, Criminal Law (11th ed.) § 271; *cf.* Campbell *v.* Commonwealth, *supra,* footnote 3; but see Dever *v.* State, *supra,* footnote 1.

[5]See McGee *v.* State (Tex. 1902) 66 S. W. 562, 563.

intent—are present, but many courts refuse to punish the offender merely because he is incited by the infamous methods of a hired detective.[6] By the weight of authority, however, the defendant is not thereby excused,[7] and he is everywhere held guilty where the intent originates within himself.[8] Similarly, the defendant is guilty of conspiracy where in conjunction with others he conspires to commit a crime, although continually urged on by a decoy,[9] but where he conspires with the decoy alone, he cannot be held for conspiracy, for there must be at least two who have the same evil intent.[10]

There are certain crimes where the lack of consent on the part of the person against whom the crime is directed is essential, as in larceny, burglary and robbery, and if the owner in such a case consents either himself[11] or through an agent,[12] there is no guilt, although the accused has done all the necessary acts with the required intent.[13] The

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[6]Commonwealth *v.* Bickings (1903) 12 Pa. Dist. 206; Connor *v.* People (1893) 18 Colo. 373, 33 Pac. 159.

[7]State *v.* Hopkins (1911) 154 N. C. 622, 70 S. E. 394; People *v.* Conrad (1905) 102 App. Div. 566, 92 N. Y. Supp. 606, *aff'd* 182 N. Y. 529, 74 N. E. 1122.

[8]Crowder *v.* State (1906) 50 Tex. Crim. 92, 96 S. W. 934; State *v.* Currie (1905) 13 N. D. 655, 102 N. W. 875. The testimony of the detective or decoy need not be corroborated in the same manner as that of an accomplice in order to secure conviction. People *v.* Noelke, *supra,* footnote 2; State *v.* O'Brien (1907) 35 Mont. 482, 90 Pac. 514; but *cf.* Davis *v.* State, *supra,* footnote 1, in which the decoy is deemed an accomplice. But the credibility of such testimony may be impaired. See People *v.* Everts (1897) 112 Mich. 194, 70 N. W. 430; Salt Lake City *v.* Robinson (1912) 40 Utah 448, 458, 125 Pac. 657.

[9]Commonwealth *v.* Wasson (1910) 42 Pa. Super. Ct. 38.

[10]Woodworth *v.* State (1886) 20 Tex. App. 375.

[11]People *v.* McCord (1889) 76 Mich. 200, 42 N. W. 1106; Roberts *v.* Oklahoma (1899) 8 Okla. 326, 57 Pac. 840.

[12]State *v.* Goffney (1911) 157 N. C. 624, 73 S. E. 162; State *v.* Hull (1898) 33 Ore. 56, 54 Pac. 159. The question of consent is ordinarily one for the jury. Bird *v.* State (1905) 49 Tex. Crim. 96, 90 S. W. 651; State *v.* Jansen (1879) 22 Kan. 498; Reg. *v.* Williams (1843) 1 Carr. & K. *195.

[13]It was held that there had been no consent in the following cases: Thompson *v.* State (1862) 18 Ind. 386 (remaining passive); State *v.* Stickney (1894) 53 Kan. 308, 36 Pac. 714 (facilitating defendant's entrance); State *v.* Abley (1899) 109 Iowa 61, 80 N. W. 225 (servant wrongfully and without master's knowledge gave key to defendant); Tones *v.* State (1905) 48 Tex. Crim. 363, 88 S. W. 617 (carrying marked money in anticipation of being robbed); see People *v.* Hanselman (1888) 76 Cal. 460, 18 Pac. 425 (feigning drunken stupor).

In the following cases it was held that there had been consent: Topelewski *v.* State (1906) 130 Wis. 244, 109 N. W. 1037 (owner in effect delivered goods to thief); People *v.* McCord, *supra,* footnote 11 (owner induced crime—but *cf.* Alexander *v.* State (1854) 12 Tex. 540); Reg. *v.* Johnson (1841) 1 Carr. & M. *218 (servant, with constructive authority from master, opened door). But in such cases the defendant might still be convicted of a criminal attempt. *Cf.* People *v.* Gardner (1894) 144 N. Y. 119, 38 N. E. 1003. And where not guilty of burglary, due to consent to the entry, he may be guilty of larceny in taking the goods. Reg. *v.* Johnson, *supra;* see State *v.* Hayes (1891) 105 Mo. 76, 16 S. W. 514. See also Reg. *v.* Hancock (1878) 14 Cox C. C. 119; Reg. *v.* Bannen (1844) 1 Carr. & K. *295.

consent of an officer of the State is not the consent of the State, nor is the State thereby estopped from prosecuting the criminal,[14] but although the State is not estopped, a private party[15] or municipality[16] cannot gain from the immoral acts of its agents. However, where it appears that the accused has not been deliberately induced to sell prohibited articles, the mere purchase by the city's agents for the purpose of getting evidence of his presumably habitual violation of the law will not prevent the municipality from recovering the penalty.[17]

In a recent case, *United States* v. *Amo* (D. C., W. D. Wis., 1919) 161 Fed. 106, two Indians were given money by a government agent to purchase liquor of the defendant. They went to his saloon and said "Whiskey", and were thereupon each given twelve glasses. The defendant was tried and convicted of selling liquor to Indians in violation of statute. The result seems just, "as the defendant intentionally violated the law on this occasion and was probably in the habit of so violating the law". But it seems difficult to reconcile this case with some other decisions of the federal courts. Where Indian women were given money by a government agent in order to purchase liquor, as the result of which they were debauched, the vendor was declared not guilty, because the judge thought that the conduct of the government agent was even more culpable than that of the dealer;[18] but can it be said that the latter was not guilty of a crime for which he should have been punished? Where by the connivance of a government official a saloon keeper was induced to sell liquor to an Indian who closely resembled a Caucasian, the court held it such a fraud on the part of the agent as to excuse the defendant who acted innocently, thinking he was selling to a white person.[19] But even here it seems that the vendor should logically have been found guilty, for he sold at his peril and the fraudulent acts of another should furnish him with no valid excuse. Some courts apparently draw the distinction between a case where no deception is used, but where the decoy simply asks for the forbidden article, there being then no doubt of the defendant's guilt,[20] and the case where the sale is induced by importuning and the employment of various artifices on the part of the detective, which are held to absolve the defendant from guilt.[21]

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[14]Faust *v.* United States (1896) 163 U. S. 452, 16 Sup. Ct. 1112; People *v.* Mills (1904) 91 App. Div. 331, 86 N. Y. Supp. 529, *aff'd* 178 N. Y. 274, 70 N. E. 786; but *cf.* Voves *v.* United States (C. C. A. 1918) 249 Fed. 190; Woo Wai *v.* United States (C. C. A. 1915) 223 Fed. 412; Peterson *v.* United States (C. C. A. 1919) 255 Fed. 433.

[15]Dennis *v.* Dennis (1896) 68 Conn. 186, 36 Atl. 34.

[16]Wilcox *v.* People (1902) 17 Colo. App. 109, 67 Pac. 343.

[17]People *v.* Chipman (1903) 31 Colo. 90, 71 Pac. 1108; City of Chicago *v.* Brendecke (1912) 170 Ill. App. 25.

[18]United States *v.* Lagers (not reported—summarized in principal case).

[19]United States *v.* Healy (D. C. 1913) 202 Fed. 349; Voves *v.* United States, *supra,* footnote 14.

[20]Goldstein *v.* United States (C. C. A. 1919) 256 Fed. 813; City of Evanston *v.* Myers (1898) 172 Ill. 266, 50 N. E. 204.

[21]Peterson *v.* United States, *supra,* footnote 14; Voves *v.* United States, *supra,* footnote 14.

Similarly to the liquor cases, the defendant is guilty of sending obscene matter through the mails when he does so in answer to a decoy letter.[22] Clearly he should be punished where he steals a decoy letter containing money from the post,[23] for in that case there is not even a solicitation. The person who sends such a letter cannot be denounced, for the defendant is not thereby directly influenced to do wrong. Nor can fault be found with a detective who purchases a ton of coal in order to see whether he is given the correct weight.[24] Another case is one where goods are given to a slave, to see who might illegally trade with him.[25] But can it be said that the decoy is not to blame where he importunes a doctor to perform an illegal operation,[26] or where he asks the defendant to print counterfeit labels?[27] Or should the law sanction such conduct as where an officer solicits or entertains an offer of a bribe in order to have the defendant tender it,[28] or where one offers money in order to have the defendant punished for taking it?[29] It was held in the foregoing cases, and rightfully so, that the principal was guilty, but may not such methods have actually induced the crime? The excuse is given that in no other way can crime be detected. It therefore narrows down to a question of policy, a choice of the lesser of two evils, and it by no means appears that it is better to allow such methods. In the words of an able judge, "Human nature is frail enough at best, and requires no encouragement in wrongdoing".[30]

But although the courts have repeatedly deprecated the methods of the decoy,[31] and sometimes imposed a lighter penalty, [32] little has been done to remedy the evil. It is true that the decoy should not be held guilty of the crime which he induces, where he sees to it that no person is injured or property rights violated, since he lacked the requisite intent, but it seems that he might be convicted of solicitation, for he has urged the commission of a certain crime, and that crime has been committed by the principal in pursuance to such instigation. The fact that the ultimate purpose was merely to punish the defendant, and the fact that the crime was arranged to be harmless to the victim, might logically be held of no account. The motive for solicitation might well be considered immaterial if the specific intent to solicit is present.

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[22]Price *v.* United States (1897) 165 U. S. 311, 315, 17 Sup. Ct. 366.

[23]Scott *v.* United States (1899) 172 U. S. 343, 19 Sup. Ct. 209; but *cf.* United States *v.* Matthews (C. C. A. 1888) 35 Fed. 890; Reg. *v.* Rathbone (1841) 1 Carr. & M. *220.

[24]*Cf.* State *v.* Salisbury Ice *etc.* Co. (1914) 166 N. C. 366, 81 S. E. 737.

[25]State *v.* Anone (S. C. 1819) 2 Nott & McC. 27.

[26]People *v.* Conrad, *supra,* footnote 7.

[27]People *v.* Krivitzky (1901) 168 N. Y. 182, 61 N. E. 175.

[28]Davis *v.* State, *supra,* footnote 1.

[29]See People *v.* Liphardt (1895) 105 Mich. 80, 62 N. W. 1022.

[30]Saunders *v.* People (1878) 38 Mich. 218, 222. See also Commonwealth *v.* Bickings, *supra,* footnote 6.

[31]See Love *v.* People (1896) 160 Ill. 501, 508, 43 N. E. 710; Connor *v.* People, *supra,* footnote 6, at p. 380; People *v.* McCord, *supra,* footnote 11, at p. 206; State *v.* Hayes, *supra,* footnote 13, at pp. 82 *et seq.*

[32]State *v.* Abley, *supra,* footnote 13.